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SUBROGATION—A CRITICAL NOTE.

Har Shyam Chowdhuri *v.* **Shyam Lal Sahu**: I. L. R. 43 C. 69. **Surjiram** *v.* **Barhamdeo Prasad**: 2 C. L. J. 288. **Muhammad Sadiq** *v.* **Ghaus Muhammad**: I. L. R. 33 A. 101. **Har Narain** *v.* **Har Prasad**: 12 A. L. J. 470. **Govindasami** *v.* **Doraisami**: I. L. R. 34 M. 119.

It is an established rule that a mortgagor paying off a first charge on the property cannot set it up as against a puisne mortgagee from himself. This is based either on the doctrine of 'accession' enunciated in S. 70 of the Transfer of Property Act, (See *Badan* v. *Murari Lal* [1]) or on the principle that in paying off the first mortgage, the mortgagor is only performing his own covenant. It is equally established, since the decision in *Gokul Das's Case* [2], that a 'purchaser' of the equity of redemption stands on a different footing; if he pays off a first charge, he is not taken to have 'extinguished' it for the benefit of a mesne incumbrancer, but is presumed to keep it alive for his own benefit and may rely on it as against a puisne mortgagee. There is a third class of cases (of which the decisions noted at the top furnish instances) wherein the purchaser of the equity of redemption expressly stipulates by his sale deed that he would himself pay off the incumbrances on the property. If in such a case he pays off a prior charge, can he set that up as against a puisne mortgagee (whose debt also is included in his sale deed but whom he has failed to pay)?

In Surjiram v. *Barhamdeo* [3] it was held that the purchaser could not in the circumstances last stated rely on the first mortgage (by way of subrogation) as against a second mortgagee; and that view was affirmed in *Bissweswar Prasad* v. *Lala Sarnam Singh* [4], *Satnarain* v. *Sheobaran* [5], and *Harshyam Chowdhuri* v. *Shyam Lal Sahu* [6]. Much the same view was taken by the Madras High Court in *Govindasami* v. *Doraisami* [7] and by the Allahabad

1. (1915) I. L. R. 37 A. 309.
2. (1884) I. L. R. 10 C. 1035.
3. (1905) 2 C. L. J. 288.
4. (1907) 6 C. L. J. 134.
5. (1911) 14 C. L. J. 500.
6. (1915) I. L. R. 43 C. 69.
7. (1910) I. L. R. 34 M. 119

High Court in *Muhammad Sadiq* v. *Ghaus Muhammad*[1] (see also *Baij Nath* v. *Murli Dhar*[2], *Dalip Rai* v. *Birnaik*[3].) The ground of decision is differently stated in the several cases and as the soundness of some of the cases seems to us open to question, it is desirable to analyse the reasons therein assigned and see how far they are merely steps towards conclusions of fact and how far they are reducible to definite principles, whose correctness may then be discussed.

In the earliest of them, *Surjiram* v. *Barhamdeo*[4] the question was first dealt with as one of intention and the learned Judges came to the conclusion (whether rightly or wrongly) that the payment relied on was intended to extinguish the prior mortgage. One of the learned judges (Mukherjee, J.) however also dealt with the case on a different footing and he laid down that the doctrine of subrogation could not be invoked by the purchasers, as they had 'retained in their hands money which they had agreed to pay in discharge of the security against which they now claim priority.' Another principle was also enunciated *viz.*, that as in paying the prior mortgage the purchaser only fulfilled his own obligation, that can give rise to no right by way of subrogation. It would be convenient to keep these two aspects of the rule separate, one relating to the character of the payment to the *prior* mortgagee, the other emphasising the violation of the obligation to pay the *subsequent* mortgagee. Both these aspects of the rule have been re-affirmed by the learned judge in later cases. In *Muhamed Sadiq's case,* the conclusion was arrived at as one of 'fact' *viz.*, against the intention to keep the prior charge alive, though reference is made in the course of the judgment, to the purchaser having 'kept in his pocket the portion of the consideration which should have been appropriated to the discharge' of the second mortgage, and, to the claim of priority being 'against the debt which he undertook to pay but which he did not discharge'. In *Baij Nath's case,*[2] as well as in *Dalip Rai's case,*[3] the decision is rested on the legal ground, while in the Madras case the legal principles stated in *Surjiram* v. *Barhamdeo*[4] are relied on not apparently as definite rules by themselves, but as reasons 'rebutting the presumption' of an intention to keep the prior charge alive. It is not clear what the result would have been in the Madras case,

1. (1910) I.L.R. 33 A. 101.
2. (1907) 27 A. W. N. 85.
3. (1909) 6 A. L. J. 549.
4. (1905) 2 C. L. J. 288.

if there was actual evidence of an intention to keep the first mortgage alive, in spite of the payment; but on the principles laid down by Mukherjee, J. even such expressed intention cannot avail to subrogate the purchaser to the rights under the first mortgage.

In so far as these authorities lay down or imply that, in the circumstances stated, the purchaser from the mortgagor has no *right* ('even if he proves the intention') to keep alive the mortgage discharged by him, so as to use it as a shield against the other mortgage, they would seem to rest substantially on the authority of American cases and text-books. With no desire to minimise the weight due to them, we nevertheless venture to doubt the propriety of applying such a rule in this country, in view of certain essential differences between the law in the United States and the law here as to the extent to which a mortgagee can have *direct* recourse against a purchaser of the equity of redemption [see an article on this point in 20 M. L. J., p 53.] The statement that the rule is founded on justice or is consonant with equity is too general to be convincing.

In the course of his speech in *Thorne* v. *Cann* [1] Lord Macnaughten observed broadly, that the option to keep alive exists in any case in which the owner of an estate 'pays charges on the estate which he is not personally liable to pay'. The reference to *personal* liability should be noted; for, in a wider sense, every transferee of the equity of redemption is liable to pay off prior charges. That is only another way of stating the rule (referred to at the outset) that there can be no subrogation when a party merely performs his own obligation. What then is the position of a transferee of the equity of redemption, when there is an agreement between him and the mortgagor that the former should pay off the incumbrances?

In some of the American States, there prevails a rule that such an undertaking amounts to an 'assumption' of the mortgage liability by the transferee, so as to give the mortgagee a direct *personal* remedy against the transferee. In this view, the purchaser of the equity of redemption (with such a covenant) would be exactly in the same position as the mortgagor *i.e.*, in discharging the prior encumbrances on the property he would only be paying off what he was

1. (1895) L. R. A. C. 11.

personally liable to pay and he could not therefore rely on that as against a second mortgagee. Even in States where the right of third parties to sue on a contract has not been recognised to such an extent, the American Courts allow the mortgagee to benefit to a limited extent out of the covenant between the mortegagor and his transferee; and to this extent, it would follow that the purchaser is liable *on his covenant* to the persons whose charges he has undertaken to pay. But neither of the abov- positions can be maintained in this country. It was laid down by the Privy Council in *Jamna Das* v. *Ramautar Pande* [1] that the mortgagor does not, by reason of such undertaking, become 'personally bound to pay' the mortgage debt and that the mortgagee, not being a party to the sale, has 'no right to avail himself' of the covenant between the vendor and the vendee. It was further laid down by the same Board, in *Izzatunnissa Begam* v. *Partab Singh* [2] that even as between the mortgagor and his transferee, it makes no difference that in the deed of transfer there is an express stipulation for payment of incumbrances by the transferee: it creates 'nothing more than a contract of indemnity' which will be implied even in the absence of such an undertaking. Why then should there be any difference, as to the applicability of the rule of subrogation, between cases in which there is such an express undertaking and those in which there is none?

It does not carry the matter much further to say that the purchaser should not be allowed to claim priority *against* a person (*i. e.*, the second mortgagee) whose debt he had agreed to pay; for the undertaking is as unavailable to the second mortgagee as to the first mortgagee. The second mortgagee has not been in any way prejudiced by the existence of such an arrangement between the mortgagor and the purchaser. It was always open to him to pay off the first charge, if he chose, or, to sue to enforce his mortgage. Why then should he derive an 'unearned' advantage (so to say) from this agreement?

Much stress is sometimes laid on the argument (i) that in such a case the purchaser pays off the first mortgagee only with the funds of the mortgagor (or as his agent) or (ii) that he is retaining in his hands a portion of the consideration which he should have applied in discharge of the second mortgage. The

1. (1911) I. L. R. 34 A. 63. 2. (1909) I. L. R. 31 A. 583.

first of these arguments, if sound; would, by itself, exclude the right of subrogation even as against mesne incumbrances which the purchaser had not undertaken to pay; but there are several decisions laying down a different view. (See *Baldeo Prasad* v. *Uman Shankar* [1], *Man Raj* v. *Ramji Lal* [2] and *Har Narain* v. *Har Prasad* [3].) It is submitted that nothing can be made to turn on the circumstance that a portion of the consideration for the transfer is expressly left with the purchaser for the purpose of paying off prior charges. The vendor can in any case get only the value of his interest *viz.*, the equity of redemption, and he has no claim against the purchaser (except by way of indemnity) in respect of the amounts due under the prior mortgages, *Izzatunnissa Begam's Case* [4]. How then can it make any difference, whether or not the value of the incumbrances is included as part of the sale price?

The view herein submitted is supported by the following observations of the Judicial Committee, in *Gokuldas's Case*, with reference to *Toulmin* v. *Steere* [5], and *Watts* v. *Symes* [6].—

"In the case before their Lordships, the debt to the bank was not paid off out of the purchase-money. The appellant purchased the interest of the mortgagor only and did not bind himself to pay off that debt. When he paid the bank some six months afterwards, it was not because he was under an obligation to do so. This case might therefore be distinguished from *Toulmin* v. *Steere* [5], *but their Lordships do not think it necessary to do this* as they are not prepared to extend its doctrine to India" (the italics are ours). The words in italics in the above extract clearly show that, in the opinion of their Lordships, the circumstances stated by them in the preceding two or three sentences should not affect the *right* (or even the presumption as to the intention) of the purchaser to keep alive the prior charge paid off by him. Cases like *Parry* v. *Wright* [7], *Brown* v. *Stead* [8] and *Greswold* v. *Marsham* [9]—which are in some measure relied on by Mukherjee, J. in *Surjiram's Case*—cannot be accepted as any guide, in the face of the above remark of their Lordships; and even *Toulmin* v. *Steere* and *Parry* v. *Wright* [7]

1. (1907) 6 A. L. J. 987.
2. (1909) 7 A. L. J. 15.
3. (1914) 12 A. L. J. 470.
4. (1909) I. L. R. 31 A. 583.
5. (1817) 3 Mer 210.
6. (1851) 1 De G. M. and G. 240.
7. (1828) 5 Russ. 142.
8. (1833) 5 Sim. 535.
9. (1685) 2 Chan. Cas. 170.

do not altogether deprive the purchaser of the right to keep alive the prior charge but permit him to do so by a conveyancing device or by a 'contemporaneous expression of intention.' (See also *Watts* v. *Symes* [1] where the first mortgage was paid off by the purchaser of the equity of redemption at the time of his purchase and out of the purchase money). The decision of the Madras High Court in *Narayanasami* v. *Narayana* [2] though referred to both in *Surjiram's Case* and in *Govindasami* v. *Doraisami* [3] has little bearing on the present topic, for no question of priority or subrogation arose there.

SUMMARY OF ENGLISH CASES.

United States Steel Products Company *v.* Great Western Railway Company: (1916) A. C. 189.

Sale of goods—Stoppage in transitu—Carriage of goods—Railway Company—Consignment note —Construction—General lien of carrier—Priority to right of stoppage in transitu.

A vendor of goods delivered them to a Railway Company for carriage to the buyers on a consignment note, one of the terms of which was "All goods delivered to the Company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods and also to a general lien for any other moneys due to them from the owners of such goods upon any account." The bill of lading for the goods had already been indorsed in blank and sent to the buyers: While the goods were still in possession of the Railway Company, the buyers of the goods became insolvents; and the vendors exercised their right of stoppage in transitu. The buyers at that time owed a sum of £ 1,170 to the Railway Company on general account. The Railway Company exercised their right of lien for the amount due on general account under the above clause of the consignment note and claimed priority for the same.

Held, the carrier has in law a lien on the goods he carries for the charges of carrying them and this lien ranks in priority over the vendor's right of stoppage in transitu; he can by a contract in appropriate language provide for a general lien on the goods he carries, for all the debts of the owner of the goods, to rank in priority

1. (1851) 1 De. M. & G. 240. 5. (1893) I. L. R. 17 M. 62.
6. (1910) I. L. R. 34 M. 119.

over the vendor's right of stoppage in transitu. On a proper construction of the language of the clause in the consignment note, the general lien created does not rank in priority over the vendor's right of stoppage in transitu. *Held*, also, that the word "owners" in the clause means persons entitled to claim delivery and as such the vendor after exercising his right of stoppage in transitu.

Bradford Corporation *v.* **Myers**: (1916) A. C. 242.

Public Authorities' protection—Limitation of time for bringing action—Act done in pursuance of execution or intended execution of an Act of Parliament or of any public duty or authority—Corporation authorised to carry on business of a Gas Company and bound to supply gas—Corporation empowered to sell coke—Negligence of a servant in the delivery of coke—Private obligation and not public duty or authority—Public Authorities Protection Act, S. 1.

A Municipal Corporation was authorised by Statute to carry on the business of a Gas Company and was bound to supply gas to the inhabitants of the District; the Corporation was also empowered to sell and dispose of the coke produced in the manufacture of gas. One of the servants of the Corporation broke a plateglass window of a Customer's shop in delivering the coke. In an action by the latter against the Corporation for the negligence of its servant the Corporation pleaded that the action would not lie by virtue of the Public Authorities Protection Act, S. 1, as it was not commenced within six months from the date of occurrence which gave rise to the action; S. 1 provided that no action could lie or be instituted against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such act, duty or authority unless it was commenced within six months of the act, neglect or default.

Held, the act complained of was not one in the execution of the Statute or in the discharge of the public duty or in exercise of public authority and the action would lie even after six months.

As the Public Authorities Protection Act restricts the ordinary rights of subjects, the Statute ought to be construed strictly.

The Statute applies equally to all acts and omissions whether breaches of contract or torts.

Central Trust and Safe Deposit Company *v.* **Snider**: (1916) A. C. 266.

Trust—Covenant to settle land—Pecuniary legacy—Quantum of interest of the covenantee—Election.

Where certain properties were conveyed to the testator by his niece in consideration of the former agreeing to pay her during her life one-half of the net rental of the property and after her death to convey one moiety of the property to her heirs, these provisions to be embodied in the will by the testator, and the testator was paying half the rental for his life and by his will made this property fall into the residue and bequeathed to her out of the residue 20,000 dollars on the footing that she had relinquished or would relinquish her claim on the property under the original agreement.

Held, The testator was not by virtue of the conveyance a trustee of a half interest in the property for the niece; and she was put to her election between taking the pecuniary legacy and taking the half interest in the property. The equitable interest of a contractee under a contract to settle immoveable property is commensurate with the power of the Court of Equity to grant specific performance of the contract.

Steedman *v.* **Drinkle**: (1916) A. C. 275.

Specific Performance—Agreement to sell land—Time essence of the contract—Default of purchaser—Forfeiture of money paid—Penalty—Relief.

Where the defendant entered into a contract to sell land to the plaintiff, part of the consideration being paid at the time of the agreement and the balance being agreed to be paid by six annual instalments payable by the 1st of December of each year and it was agreed that in default of payment of any of the instalments, the defendant was to be at liberty to cancel the agreement and retain the amounts paid up to that time by way of liquidated damages and the plaintiff committed default in payment of one of the instalments and subsequently sued for specific performance of the agreement or in the alternative to be relieved from the ferfeiture;

Held, the parties having specifically agreed that time was to be of the essence of the contract, specific performance of the contract cannot be ordered; but that the forfeiture of the amounts paid being of the nature of penalty can be relieved against.

Courts of Equity which look at the substance as distinguished from the letter of the agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases, where justice requires it even though literal terms of stipulations as to time have not been observed. But they never exercise the jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is of the essence of their bargain. If however the parties having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach.

Stoodley, *In re*: **Hooson** *v.* **Locock.** (1916) 1 Ch. 242 (C. A.)

Will—Construction — Codicil — Revocation—Residuary disposition in will—Different—Bequest in codicil, effect of—Trust—Gift to a charity—Want of trustee—Duty of Court.

The testator, by his will, appointed certain persons as executors, and then, using the words "I bequeath," gave several specific and pecuniary legacies and using the words "I give and devise," he made certain specific devises of real estate. He then inserted a general bequest of his real and personal estate in these terms: "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees . . . . . that they shall hold the residue of the said monies and the income thereof in trust for the Society for Promoting Christian Knowledge etc. . . ." By a codicil to his will the testator, after referring to his will, gave and bequeathed "the residue of my estate, not bequeathed by the above will;".. to M. A. L. absolutely and appointed her sole executrix of the codicil.

Held that the residuary gift in the will was revoked by the codicil and that under the codicil the whole of the testator's estate undisposed of by legacies or specific bequests passed to M. A. L.

The principle of law is, that if you find a residue given by will, and then there is a codicil, giving that residue to a different person or in a different mode, it is really a revocation of the gift of the residue by the will.

A gift to a charity never fails for want of a trustee, because the Court would see that a proper trustee was appointed and would take care, if necessary, that it should be done under the direction of the Attorney-General.

Drexel *v.* **Drexel**: (1916) 1 Ch. 251.

Jurisdiction—Writ—Service out of jurisdiction—Domicil—"Ordinarily resident within the jurisdiction"—Cause of action—Contract—Separation deed—Agreement to pay allowance—Breach—Supreme Court Rules, O. 11 R. 1 (c) & (e).

The plaintiff and her husband, Americans by origin, married in America in 1886. In 1897 they came with their children to England with the intention of residing in England permanently and acquired an English domicil. The husband was connected with a banking business in Paris and America. In January 1913, plaintiff and her husband entered into a deed of separation, prepared in America and executed by the husband in America and by the wife in England, by which the husband covenanted to pay his wife an annual sum of 50,000 dollars. No place for payment was stated in the deed. Both the parties lived in England till June 1915, when the husband closed his establishment in England and went to Paris with intent to acquire a French domicil and to institute divorce proceedings against the wife in the French Courts. The wife issued a writ in July 1915, against her husband, to enforce the terms of the separation deed, and obtained leave under O. 11 R. 1 (c) to serve the writ on him in Paris, on the ground that he was ordinarily resident in England. On a motion by the husband to discharge the service of writ.

Held, that under the circumstances the husband had abandoned his domicil of choice in England and that he was ordinarily resident in England at the date of the issue of the writ.

The covenant to pay the allowance was however a contract within O. 11 R. 1 (e) of the Supreme Court Rules, the breach of which entitled the wife to sue in England, which was the place of residence of the creditor.

Plyn *v.* **Weston Feature Film Company**: (1916) 1 Ch. 261.

Copyright—Infringement—Burlesque of literary production—Novel—Cinematograph film—Immoral and indecent scenes—Right of action—Copyright Act, 1911 (1 and 2 Geo. V. C. 46). Ss. 1 and 7.

This was an action by the plaintiff for the alleged infringement of the copyright in a novel, by the sale of burlesque cinematograph films, which were said to be substantial repro-

ductions of the novel. The plaintiff claimed an injunction and damages. It was found on the facts that there was no such infringement.

A genuine burlesque of a serious work may not constitute an infringement of copyright (though it may under certain conditions justify an action in the nature of slander of goods) either on the principle that a burlesque is usually the best possible advertisement of the original and has often made famous a work which would have otherwise remained in obscurity or on the principle that no infringement of the plaintiff's right takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result.

Copyright cannot exist in a work of grossly immoral tendency, though the Courts in this matter is now less strict than it was in the days of Lord Eldon.

Hall-Dare, *In re*: **Le Marchant** *v.* **Lee-Warner.** (1916) 1 Ch. 272.

Will—Construction, difficulty in, owing to the terms of the will—Summons by executor—costs—Supreme Court Rules, O. 45 R. 14-B.

Where an executor takes out an originating summons for the construction of a will and for the determination of the rights of the legatees and the amounts payable to them, and it is found that the necessity for the Summons is entirely attributable to the ambiguity of the language of the testatrix herself, *Held* that the costs of the Summons are costs of administration or testamentary expenses, and *prima facie* they ought to be borne by the residue. O. 45 R. 14-B. of the Supreme Court Rules, has no application to a case where the difficulty necessitating the application is directly attributable to the imperfect phraseology of the testatrix herself.

Timson, *In re*: **Smiles** *v.* **Timson.** (1916) 1 Ch. 293.

Will—Construction—Issue—Parent—Meaning of.

By her will the testatrix gave her residuary estate, subject to a life-interest to five named nephews and nieces, and provided that, if any of them should die in the life-time of the tenant-for-life leaving "issue," such issue should take the share which his, her

or their deceased "parent" would have taken if living; if any of them die in the life-time of the tenant-for-life without leaving issue, the share of the one so dying should go to the survivor or survivors and the "issue" of him, her or them so dying and leaving issue. *Held*, that the word "issue" throughout the will must be confined to children.

Rainbow *v.* **Kittoe:** (1916) 1 Ch. 313.

Practice—Costs, security for—Suit by administrator—Administrator acting as agent for person out of jurisdiction—Insolvency of administrator.

A plaintiff who sues as an administrator for recovery of the estate, will not be ordered to give security for the defendant's costs of the action. This is so even if the letters of administration are granted to the plaintiff as the attorney of a person who is abroad and until that person obtains letters of administration, and the plaintiff is shown to be an insolvent.

Staples, *In re*: **Owen** *v.* **Owen**: (1916) 1 Ch. 322.

Declaration —Future Rights —Practice —Supreme Court Rules, O. 25 R. 5.

Under O. 25 R. 5 of the Supreme Court Rules it is competent to the Court to make a declaration at the plaintiff's instance, though at the time he had no cause of action. Notwithstanding the jurisdiction of the Court to make a declaration as to future rights (even then, the matter is one of discretion rather than of jurisdiction), in practice such a declaration should not, as a rule, be made where all the parties interested are not ascertained; and the rule laid down by Jessel, M. R. in *Curtis* v. *Sheffield* [1], holds good even at the present time.

Carnell *v.* **Harrison**: (1916) 1 Ch. 328. (C. A.)

Infant—Marriage Settlement of reversion—Repudiation—Reasonable time—Ignorance of right, effect of—Ante Settlement rights of parties, immaterial.

An infant must repudiate within a reasonable time after attaining the age of majority, a settlement of reversionary property made by her on her marriage. In the case of a Settlement of reversionary property, the "reasonable time" has to be calculated not

1. (1882) 21 Ch. D. 1.

from the date when the reversionary property falls into possession and becomes payable to her or her trustees but from the date of her attaining the age of 21.

In construing a contract or considering a question of repudiation of a marriage settlement, the consideration of the ante-settlement rights of the parties with respect to the property settled, is immaterial. An infant cannot plead ignorance of her right to repudiate as an answer to her obligation to exercise that right within a reasonable time.

Dacre, *In re* **: Whitaker** *v.* **Dacre.** (1916) 1 Ch. 344 (C.A.)

Trust—Defaulting Trustee—Legacy to Trustee—Assignee of legacy—Right of—Set-off—Administration of Estate.

A defaulting trustee cannot claim a share in the estate until he has made good his default. Where a trustee who is also a beneficiary is found to have misapplied a portion of the trust funds, and therefore, to be a defaulter, yet if he is able to produce as much as is necessary to satisfy the other beneficiaries he is not really in default, but is to be treated as having paid himself by advance or in anticipation. That principle applies not merely to a trustee but to an assignee for value from a trustee; it also applies to a trustee although, in the first place, he was not a beneficiary, but has since acquired a beneficial interest by a derivative title. There again he is not allowed to aver that he has misappropriated the money; he is not supposed to have misappropriated the money if by any possibility he can be treated as having paid himself. Again, the assignee of a trustee taking under a derivative title will be in the same position. Possibly it is to be understood that the trustee has properly applied the money; therefore it is not open to anybody claiming under the trustee to say he has not properly applied the money to the extent he is in default; to that extent he is deemed to have been paid.

JOTTINGS AND CUTTINGS.

The Poor Man's Lawyer.—Eighteen months have passed since the new system of legal aid came into force, and notwithstanding the difficulties caused by the war, the 'Poor Persons' Rules as is shown by the official statement printed in another column, have worked successfully. Over 4,000 applications have been received during this period, of which considerably more than

one-fourth have been granted. It is in matrimonial matters that the system has proved most effectual, no fewer than 200 decrees *nisi* having been granted to persons, who, without the assistance afforded by the new rules, would have found it difficult, if not impossible, to obtain the relief they were entitled to. Both in the Chancery Division and King's Bench Division, as well as in the Divorce Court, substantial results have been obtained. Not the least merit of the new system is that it tends to destroy the private organisations, which, under the misleading name of 'Poor Man's Lawyers' batter upon necessitous persons with legitimate grievances. How mischievous and dishonest these spurious organisations may be is shown by the case at the Central Criminal Court, in which two fraudulent 'poor man's lawyers' were sentenced by the Common Serjeant on Tuesday to rather lenient terms of imprisonment. It would be well now that the official system of legal assistance is in good working order, if all these so-called 'Poor Man's Lawyers' instituted and conducted for private gain, were suppressed.—*The Law Journal, 18th March 1916.*

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Bar Council and Ethics of Advocacy.—The Bar Council have been dealing with a request for advice from the Bar Committee at Shanghai on an old, old question as to the ethics of advocacy. The Council's decision was that if a confession of guilt was made to the Advocate before the proceedings were begun it was most undesirable that he should undertake the defence; but that if it was made during the proceedings or in such circumstances that the Advocate retained for the defence could not retire from the case without seriously compromising the position of the accused person, the advocate's duty was to protect his client so far as possible from being convicted except by a competent tribunal and upon legal evidence, sufficient to support a conviction for the offence with which he was charged. An eminently sound view. The stock illustration is the case of Lord William Russell, murdered in 1840 by his valet Courvoisier. On the second day of the trial of Courvoisier, who knew that he had been recognised, sent for his counsel and told him that he had committed the murder. He said that he was not guilty, and that he expected Mr. Phillips to defend him. Counsel was for throwing up the case, but his junior told him that this would not be right, and ultimately they decided to consult Baron Parke, be-

fore whom and the Lord Chief Justice the trial was taking place. Baron Parke's first question was: "Does the prisoner require you to go on defending him?" And being satisfied of that, he said, that counsel must not throw the case up and that it was Mr. Phillip's duty to go on with it, taking care, of course as to what he said, and seeing that he did not incriminate any other persons, but to defend the man fairly and properly upon the evidence.—*The Law Notes, Feb. 1916.*

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Lord Chief Justice's Quasi Political duties.—The decision of the Divisional Court, since confirmed by the Court Appeal, in *Rex v. Halliday* is an apt illustration of the undesirability of using our judges for any purposes other than purely judicial duties. The decision is probably absolutely correct in law, but a quasi political judge—a judge who has been sent by the Government on a quasi political international mission—should not have formed one of the court.

By its decision the Divisional Court and now the Court of Appeal, has given the Government vast powers. That a British subject may be interned during the war may be necessary, but Parliament went far when it extended the internment provisions of the Defence of the Realm Act, 1914, to British subjects. It will be noted, however, that the power only arises as to British subjects of hostile origin or associations.

Theoretically, the liberty of the subject, the provisions of Magna Charta and the power of Habeas Corpus are gone. In these days we are only too ready to the curtailment of our liberties to give the Government, in short, all they ask for, but the Lord Chief Justice, who is a quasi-politician should not have presided over the Court which gave this decision.—

The present Lord Chief Justice possesses probably the power of the Lord High Executioner. One moment he is the Lord High Financial Government Agent, the next the Lord High Government Enquirer, and the next the Lord Chief Justice of England.

The welfere of the nation demands that the executive and the judicial authorities should not be too friendly.—*The Law Notes, March 1916.*

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Shortest Judicial Summing up.—A Law Journal asked by a lay newspaper what is the shortest judicial summing up on record thinks that the palm should be awarded to Judge Rentoul, one of the present Judges of the London Criminal Court. "Gentlemen of the Jury," said he, "you have heard Mr. X say everything that there is to be said for the prisoner—which amounts to exactly nothing. Consider your verdict". The second prize it thinks should be given to a certain Judge in a case concerning loss of property on a rail road. "Gentlemen, in this case the plaintiff claims a hundred pounds for goods lost on the defendants' line. Railways are always losing peoples' things. They lost a bag of mine last week. Consider your verdict'. Very good for England. But the first prize, as the Docket several years ago pointed belongs to this side of the water and to a contributor to this very number of the Review, and an old friend of the The Docket, Mr. Justice Riddel, of the High Court of Ontario. The lawyers on both sides had finished their lengthy arguments, when the Judge seeing that the only question in the case was the measure of damages charged the Jury in but three words: "Gentlemen, How much?"—*American Law Review, 1916.*

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The Jolly Testator who makes his own will.

Ye lawyers who live upon litigants' fees,
And who need a good many to live at your ease,
Grave or gay, wise or witty, whate'er your degree,
Plain stuff or Queen's Counsel, take counsel of me.
When a festive occasion your spirit unbends,
You should never forget the Profession's best friends;
So we'll send round the wine and a bright bumper fill,
To the jolly testator who makes his own will.

He premises his wish and his purpose to save
All disputes among friends, when he is laid in the grave;
Then he straightway proceeds more disputes to create
Than a long summer's day would give time to relate.
He writes and erases, he blunders and blots,
He produces such puzzles and Gordian knots,
That a lawyer intending to frame a deed ill
Could not match the testator who makes his own will.

Testators are good; but a feeling more tender
Springs up when I think of the feminine gender;
The testatrix for me, who, like Telemarque's mother
Unweaves at one time what she wove at another.
She bequeaths, she repeats, she recalls a donation,
And she ends by revoking her own revocation,
Still scribbling or scratching some new Codicil,
Ah!—success to the woman who makes her own will.
'Tisn't easy to say 'mid her varying vapours
What scraps should be deemed testamentary papers;
'Tisn't easy from these her intentions to find,
When perhaps she herself knew her own mind.
Every step that we take there arises fresh trouble—
Is the legacy lapsed? is it single or double?
No customer brings so much grist to the mill
As the wealthy old woman who makes her own will.
The law decides questions of *meum* and *tuum*
By kindly consenting to make the thing *suum*;
The Aesopean fable instructively tells
What becomes of the oyster and who gets the shells
The legatees starve but the lawyers are fed,
The seniors have riches, the juniors have bread;
The available surplus of course will be nill.
For the worthy testators who make their own will.
You had better pay toll when you take to the road
Than attempt by a bye-way to reach your abode;
You had better employ a conveyancer's hand
Than encounter the risk that your will shouldn't stand
From the broad beaten track where the traveller strays,
He may land in a bog or be lost in a maze:
And the law, when defied, will revenge itself still
On the man and the woman who make their own will.

Juridical Review.

CONTEMPORARY LEGAL LITERATURE.

In the American Law Review for January—February, Chief Justice Walter Clark makes a vigorous attack against the theory of the Court's jurisdiction to declare acts of Sovereign legislatures *ultra vires*. In this controversy, which has been raging for a very

considerable time, he sides Thomas Jefferson as against Chief Justice Marshall. Another writer in the same Journal deplores the alarming growth of extremes of wealth and poverty in the United States which invariably breed social inequality and therefore generate rancorous class antagonisms. Unless the law is made to weld this incoherent mass together, by substituting common property interests for those hostile interests which now prevail, the sporadic social warfare waged between capital and labour may lapse into chaos. He illustrates the point by reference to English History.

An important subject of which Tolstoy very often treats in his social writings is law. His doctrine as to law differs largely from the teaching of Plato, Aristotle and others. He recognises only divine or eternal laws but not the human. "The human or the written laws are not just. They are capricious and artificial; Jesus Christ nullifies them and confirms only the eternal law". In place of the written law Tolstoy would substitute the supreme law of love, fraternity and equal opportunity. This violent prejudice against law is due to the autocratic system under which he lived.

Professor Lee's lecture on *Legal Education, Old and New* appears in two consecutive issues of the 'Canadian Law Times.' In the best days of Roman Law, instead of lawyers taking their law from the Courts it was the Court that took its law from the lawyers. Unenslaved by the accident of forensic necessity they were free to consider each problem, as it arose, in its proper relation to morals and legal principle. The revival of Roman Law in the twelfth century was the beginning of what Professor Vinogradoff not inaptly calls a ghost story. The Roman law was then taught for its scientific value for the law which is practised in Courts is entirely different. But soon, this law came to affect the law in Courts and thus to be of interest to practising lawyers. The age of codification has thrown the Roman Law again into the background but its scientific value is still recognised and its study is made a compulsory preliminary to practice in the Continent. In England, Roman Law is taught in the Universities; in the Inns only English Law is taught. In the United States of America, once the astounding notion prevailed that any adult citizen who could walk and talk had a natural right to practise law. In Indiana good moral

character is still all that is wanted. In England, the practice of reading in Chambers is coming more and more into vogue. In Canada, the system of apprenticeship to a law office is universal. In Manitoba, attendance at law school is made compulsory. In all the provinces of Canada there is a reduction of the period of apprenticeship in favour of Graduates in Arts or Law. The Professor suggests that a mere study of the practice of Law or even the knowledge of the law is not sufficient to make a thorough and scientific lawyer and therefore recommends a study of Roman Law, Jurisprudence and International law as a University Course.

BOOK REVIEWS.

THE LAW OF PARTITION AS ADMINISTERED IN INDIA, *by S. C. Mitter, Esq., B.A., Barrister at Law First Edition, Butterworth & Co. (India) Ltd., Calcutta. Price Rs. 3.*

In this book, the writer attempts to give a comprehensive account of the Law of Partition in India. We have no doubt the book will be found useful by the profession. Its usefulness would have been considerably enhanced if the writer instead of merely recording the effect of case-law had undertaken to consider and suggest solutions for the numerous difficulties that arise in the working of this branch of the law, if need be, by reference to English precedents.

THE LAW OF TRANSFER IN BRITISH INDIA, VOL. III, 4TH ED., 1916, *by Dr. H. S. Gour. Thacker Spink and Co., Calcutta, Rs. 10.*

The volume completes the well-known treatise on the Transfer of Property in British India which is mainly a commentary on the Transfer of Property Act by Dr. Gour. The volume under review comprises the Law of Landlord and Tenant, Gifts, Exchanges and Choses-in-action. The reader will find the case law on the subjects brought down to the end of January 1916; and the addenda at the end of the volume note the cases on the branches of law dealt with in Vol. I and II up to date. We have no doubt that Dr. Gour's book will continue to enjoy a very high place among the commentaries on the Transfer of Property Act for its exhaustiveness and usefulness to practitioners.

THE INDIAN DECISIONS (OLD SERIES) VOL. 14, *by The Law Printing House, Madras.*

It was only last month that we announced the publication of Vols. 12 and 13 of the series; and now we are in receipt of Vol. 14 which contains the reports of cases in Vol. 11 and part 1 of Vol. 12 of the Bengal Sudder Dewani Adaulut Reports. This volume it need hardly be mentioned maintains the high level of its predecessors.

THE PROVINCIAL INSOLVENCY ACT, (*Lawyer's Companion Series) 1916.*

The Lawyer's Companion Office has brought out this edition of the Provincial Insolvency Act as a companion volume to their publications of the other important works. The book will be particularly useful to the practitioner by reason of its introduction and the frequent references to English law in the body of the book.

A DIGEST OF ENGLISH CIVIL LAW *by Edward Jenks, M. A., B. C. L. Books IV and V, 1916. Butterworth Co., London.*

In the present circumstances, the wonder is not that there has been so much delay in the appearance of this part of the Digest but that it has appeared at all. The Law of Property having been completed with the last volume, the present one deals with (*A*) Family Law and (*B*) a portion of the Law of Succession, *viz.*, Testamentary Succession. The former covers 9 titles dealing respectively with S. I. Marriage Title I.—Celebration of Marriage. II.—Invalid and Voidable Marriage. III.—Jactitation of Marriage. IV.—Rights and Duties Arising out of Marriage. V.—Nullity, Divorce and Judicial Separation. S. II.—Relations of Children, Parents, and Guardians. Title I.—Legitimacy. II.—Duties of Maintenance and Education. III. —Custody and Guardian of Minors. IV.—Powers of Parents and Guardians in relation to the property of Minors. In the Law of Succession (Book V) S.I. begnis with Testamentary Succession. Title I.—The making of Testaments and Codicils. II.—The Revocation, Alteration, and Republication of Testaments and Codicils. III.—Capacity to make or attest a Testament or Codicil. IV.—Devises, Legacies, and Donations, Mortis Causa. In the next part it is hoped to finish the rest of the Law of Succession (*i. e.*, Intestate Succession and the distribution of Assets); and that will make the completion of

a work which in its treatment of the English Civil Law as a whole, may well be said to be unique. To us in India, the topics of Family Law in England and portions of the law relating to wills are more of theoretical interest than of direct practical application, most people here being governed by their own personal laws in such matters. To those familiar with the Indian Succession Act, the titles of the present book relating to the making of wills and their revocation, Devices, Legacies, &c., must be more or less familiar reading. But these considerations need not prevent our appreciation of the clearness and accuracy characteristic of the book.

THE HINDU LAW OF ADOPTION (TAGORE LAW LECTURES, 1883) *by Golap Chandra Sircar Shastri, M. A., B. L., Edited by Rishinda Nath Sircar, M.A.B.L., Vakil, High Court, Calcutta (2nd Edition, 1916; R. Cambray & Co.*

A melancholy interest attaches to this edition in that the author did not live to see its publication though he seems to have prepared the book for the press. Neither Sircar Shastri nor his work on Adoption requires any introduction from us. Both are well-known to the profession. The lectures are among the most valuable in the series and have largely helped to settle the law and there is no doubt their value will be felt whenever a new point arises for decision. By his learning and habit of vigorous thinking, Sircar Shastri has been able to give an interesting turn to many a discussion and though his views have not always found favour with the courts, they have contributed remarkably to the elucidation of the law. Need has not been felt for much alteration of the text, but all changes in the law have been carefully noted with comments where necessary. The case-law has been brought up-to-date.

SANJIVA RAU'S *All India Digest Criminal, 1836-1915. Vol. II, 2nd Edition.*

We have great pleasure in announcing the publication of the 2nd volume of this useful digest. Sanjiva Rau's is the only digest, so far as we are aware, of criminal rulings exclusively; and it will be particularly useful to practitioners devoting their attention to Criminal work.

DESAI'S *Point-noted Index of Cases judicially noticed. 1811 —1915, Fifth Edition, 1916.*

The main features of the work are so well known to the legal profession in this country that it is needless to draw attention to them. So far as we are aware, the late Mr. S. Srinivasa Iyer originated the idea in this country of publishing an index of cases setting out the particular points on which the cases have been followed or otherwise judicially noticed. He, however, did not live to complete the work. Shortly after Mr. Srinivasa Iyer started the idea, Mr. Desai published the Fourth Edition of his "Index of Cases" in which he partially introduced the system of point noting. The present Edition carries out the system fully to all the Indian Cases.

The present Edition marks a further progress in the indexing of cases, in that it makes an attempt at bringing together cases which have a bearing on the case in hand, though not specifically noticing the case. With the increased facilities offered, the book is sure to be of invaluable assistance to all practitioners.

[*End of Vol. XXX.*]

NOTES OF RECENT CASES.

Abdur Rahim, J.
Srinivasa Aiyangar, J.
1916 January, 3.

A. S. Nos. 165 and 409 of 1914.

Companies Act—Secretary—Personal liability to members—Agreement as to—Validity—Liability imposed in return for payment by members—Effect.

There is nothing in the Companies Act to prevent the Secretary of a limited company from making himself presonally liable to members for amounts due to them from the company where the members agree to pay the Secretary a specified monthly salary out of monthly contributions made by the members.

C. V. Ananthakrishna Aiyar for Appellant.

T. R. Ramachandra Aiyar and *S. Viswanatha Aiyar* for Respondent.

Coutts-Trotter, J.
Seshagiri Aiyar, J.
1916 January, 4.

S. A. No. 2442 of 1914.

Hindu Law—Widow succeeding to husband's estate—Deed dividing estate between two daughters—Effect—Death of widow and one of daughters—Right of surviving daughter to succeed to whole estate.

A document under which a Hindu widow, who had inherited the estate of her husband, divided the same between her two daughters giving each authority to alienate, should be construed to deal only with her widow's estate. On the death of the widow and one of the daughters, the other daughter is entitled to possession of the whole estate.

C. V. Anantakrishna Aiyar for Appellant.

V. Ramdoss for Respondent.

Ayling, J.
Napier, J.
1916 January, 5.

S. A. No. 30 of 1915.

Mortgage—Redemption—Right of—Extinguishment—Simple money decree obtained by mortgagee against mortgagor—Purchase of mortgaged property by mortgagee himself in execution—Failure of mortgagor to object to validity of sale—Effect—Subsequent suit for redemption—Maintainability.

Where, in a suit for redemption, it appeared that the defendant, the mortgagee, had previously obtained a simple money decree against the plaintiff and purchased the mortgaged property himself in execution thereof, *held* that, the plaintiff having been a party to the prior proceedings and not having contested the validity of the sale in the execution proceedings therein, his right of redemption was lost.

V. S. Govindachariar and *Kallabiran Aiyangar* for Appellants

K. S. Ganapathi Aiyar for Respondent.

Ayling, J.
Napier, J.
1916 January, 5.

S. A. No. 400 of 1915.

Transfer of Property Act. S. 54—Sale of property of less than Rs. 100 in value—Property previously in possession of vendee—Registered instrument—Necessity—Unregistered sale-deed with recital as to delivery of possession—Effect.

A sale of immovable property of less than Rs. 100 in value and already in the possession of the vendee can only be effected by a registered instrument. In such a case, an unregistered sale-deed containing a recital that the vendor thereby gave possession of the property to the vendee is not sufficient to convey title.

V. Ramesam for Appellant.

V. Ramdoss for Respondent.

Sadasiva Aiyar, J.
Moore, J.
1916 January, 7.

C. R. P. No. 188 of 1914.

Civil Procedure Code of 1908 O. 21, R. 89—Execution sale—Application for setting aside—What amounts to—Deposit of money into treasury after filing lodgment schedule—Effect.

The deposit of money into the treasury after filing a lodgment schedule into court does not amount to an application to set aside the sale within the meaning of O. 21, R. 89 of the Code.

C. R. P. No. 415 of 1904 and 359 of 1902 followed.

P. Somasundaram for Petitioners.

P. R. Srinivasa Aiyangar and *H. Suryanarayana* for Respondent.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Moore, JJ. }
1916 January, 12. } L. P. A. No. 360 of 1914.

Madras Estates Land Act S. 6—Applicability—Ijara for actual cultivation—Ijaradar if "ryot." within meaning of Act—Right to occupancy right by reason of Act—High Courts Act of 1861 S. 15. Applicability—Godavery Agency Courts if subject to jurisdiction of High Court.

An ijaradar who obtains an ijara muchilika for purposes of actual cultivation is a "ryot" within the meaning of the Madras Estates Land Act and obtains occupancy rights under S. 6 thereof.

Quaere whether the Godavery Agency Courts governed by the Godavery Agency Rules framed under Act XIV of 1874 (Schedule District's Act) are subject to the appellate jurisdiction of the High Court under S. 15 of the Indian High Court's Act of 1861.

23 M. 329 referred to.

D. Appa Rao and *P. Narayanamurti* for Appellant.

P. Somasundaram for *Hon. B. N. Sarma* for Respondent.

Sadasiva Aiyar and Moore, JJ. }
1916 January, 24. } C. M. A. No. 352 of 1914.

Limitation Act, Art. 182—Execution—Step-in-aid—Application for adjournment, for getting encumbrance certificate.

An application by the decree-holder for an adjournment, in order to enable him to get an encumbrance certificate for the purpose of preparing the sale-proclamation, is a step-in-aid of execution.

P. Chenchiah for Appellant.

L. A. Govindaraghava Iyer for Respondent.

Sadasiva Aiyar and Napier, JJ. }
1916 January, 25. } S. A. No. 431 of 1914.

Church—Roman Catholics—Right of worshippers—Claim by one section to exclude another, from a part of the Church—Concessions by one Bishop, if binding on successors.

Where a section of Roman Catholic Christians claimed to exclude another section of the same community belonging to the

same Church, from occupying a wing of the Church, on the ground of an alleged inferiority of caste on the part of the latter, *held* that the claim was opposed to the rules and tenets of the Catholic Church and could not be allowed. A concession of such a claim by one Bishop is not binding on his successors-in-office.

T. Rangachariar and *V. S. Govindachariar* for Appellants.

W. Barton for Respondent.

Ayling, and Napier, JJ.
1916 January, 27. S. A. No. 80 of 1915.

Civil Procedure Code S. 66—Scope of—Person claiming title under purchase certified by Court—Meaning of—Release, not effective to pass title.

In execution of a decree against the plaintiff, his properties were sold in Court auction and purchased by A. Subsequently A, alleging that he purchased the property *benami* for the defendant executed a deed of release in favour of the latter. The plaintiff, claiming that the purchase by A and the subsequent release in favour of the defendant were *benami* for himself sued for a declaration that he was in possession as owner and for an injunction restraining the defendant from interfering with his possession. *Held* that the release by A in favour of the defendant was not effective to pass a title to the properties, that the defendant could not be said to be a person claiming title under a purchase certified by the Court and that S. 66 of the Civil Procedure Code was no bar to the maintainability of the suit.

Jadu Nath Poddar v. *Rup Lal Poddar* [1], followed.

T. M. Krishnaswami Iyer and *A. V. Visvanatha Sastri* for Appellant.

K. Bhashyam Iyengar for Respondents.

Ayling and Napier, JJ.
1916 January, 28. S. A. No. 2360 of 1913.

Co-heirs—Mahomedan Law—Adverse possession—Mortgage of property by one co-heir—Rights of mortgagee against other heirs, without notice of mortgage.

Where one of several co-heirs under the Mahomedan Law, is in possession of the whole property forming part of the inheritance

1. (1906) I. L. R. 36 C. 967, 984.

and gives a kanom mortgage of the same describing it to be exclusively his own and the mortgagee is in possession for more than 12 years, such possession of the mortgagee is not adverse to the other co-heirs so as to give him a valid mortgage right as against the shares of the other co-heirs unless the other co-heirs had notice of the mortgage.

1914 M. W. N. 708, 38 M. 903, followed.

23 B. 137, distinguished.

T. K. Govinda Aiyar for Appellant.

P. V. Parameswara Aiyar for *C. V. Anantakrishna Aiyar* for Respondent.

Ayling and Napier, JJ.
1916 January, 31.

S. A. No. 487 of 1915.

Madras Estates Land Act—Ss. 4, 27 28—Applicability—Suit for rent—Plea of custom to pay rent on cultivated lands only—Sustainability—Provisions of Rent Recovery Act compared.

S. 4 of the Madras Estates Land Act must be read subject to the provisions of S. 27 thereof and it is open to a tenant to plead a custom that only cultivated lands in a village can be charged with rent.

26 M. L. J. 575, (1915) M. W. N. 192, followed.

Per Napier, J;—Ss. 27 and 28 give the widest possible powers to a Revenue Officer. A claim to pay a reduced amount of rent or reduced rent on the whole holding in a particular year by reason of the fact that a portion of the holding remained uncultivated in the preceding year can be considered under Ss. 27 and 28. Old and New Acts compared.

M. D. Devadoss for Appellants.

T. S. Ramaswami Aiyar for Respondents.

Ayling and Napier, JJ.
1916 February, 1.

S. A. No. 2654 of 1913.

Limitation Act of 1908—S. 23; Art. 120, 124, 131, 144—Applicability—Temple Committee—Suit for declaration that suit temple is subject to their jurisdiction and for decree directing

defendants to plaintiffs' supervision—Limitation—Denial of right of Committee more than 6 years before suit—Effect.

Where in a suit by a Temple Committee appointed under Act XX of 1863 for a declaration that the suit temple was subject to the jurisdiction of the plaintiffs and for a decree directing the defendants, who were not appointed by the Committee, to submit the account-books and properties of the temple to the supervision of the plaintiffs, it appeared that the defendants had denied the right of the plaintiffs more than 6 years before suit, *held*, that

1. Neither Art. 124 nor Art. 144 of the Limitation Act applied to the case.

2. The suit was not governed by Art. 131, as the right of the Committee was not a recurring right within the meaning of that Art;

3. The suit did not fall within S. 23 of the Act as the denial by the defendants of the right of the plaintiffs and the refusal to submit to their supervision was not a continuing wrong within the meaning of that section.

4. The suit, being one for declaration, was governed by Art. 120 and inasmuch as the plaintiff's right to the declaration of their right was barred, their right to supervision was also barred.

H. Balakrishna Rao for *K. Narayana Row* for Appellants.

A. S. Viswanatha Aiyar for Respondents.

Sadasiva Aiyar and Moore, JJ.
1916 February, 1.

L. P. A. No. 131 of 1915.

Civil Procedure Code O. 23, R. 1—Partition suit—Withdrawal of suit by plaintiff—Defendant applying to continue suit as plaintiff—Duty of Court.

Where the plaintiff in a partition suit withdraws his suit under O. 23, R. 1 C. P. Code, and one of the defendants claiming a share in the property applies to continue the suit as plaintiff, *held*, that the Court is not bound to allow the defendant to so continue the suit.

T. Prakasam for Appellant.

M. Patanjali Sastri for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 February, 1.

C. M. A. No. 197 of 1914.

Provincial Insolvency Act Ss. 4 (a), 6 (3), 36 and 38—Transfer to trustee, on behalf of creditors—Transfer, if voidable at the instance of Official Receiver — Adjudication — Property of Insolvent if vests in Receiver—Transfer by debtor to trustee for benefit of creditors—Creditor privy to act of bankruptcy of debtor, if can apply for adjudication.

S. 4 (*a*) of the Provincial Insolvency Act does not exclude a conveyance to some of the creditors as trustees for the general body of creditors. A transfer made *bona fide* by a debtor to trustees for the benefit of creditors cannot be annulled under S. 36 of the Act. As soon as an adjudication order is made, the properties of the Insolvent cannot be treated as having vested in the Official Receiver. To have that effect, an order under S. 18 of the Act, appointing a Receiver is necessary.

A debtor cannot avail himself of a transfer of property to a third person for the benefit of his general body of creditors, as an Act of insolvency under S. 6 Cl. 3, though a creditor can do so under S. 4 Cl. (a) of the Act.

It is not open to a creditor to present a petition for adjudication if he has been privy to the Act of bankruptcy on which he relies.

S. T. Srinivasagopala Chariar for Appellant.

C. V. Ananthakrishna Iyer for Respondent.

Coutts Trotter, J.
1916 February, 1.

C. R. P. No. 294 of 1915.

Broker—Commission of—Agent for purchase and agent for sale, difference between—Broker for purchase, duty of—Defect in title—Executory contract by vendor to third person—Effect of—Completion of sale-deed—Broker, if entitled to commission.

There is a difference between the rights and liabilities of a broker who acts as an agent for the sale of lands and one who acts as an agent for the purchase of lands. A broker for sale has earned his commission as soon as he finds a willing purchaser and brings him into contact with his principal, though the actual

sale is brought about by the intervention of some body else. A broker for the purchase of lands must secure for the vendee a free and clear title and is bound to communicate to his principal any defects in the title of which he is aware. The mere fact that the vendor had entered into a contract for the sale of a portion of the lands to a third person some 2½ years before the date of sale to the vendee, is not a defect in the title of vendor and a broker who buys such lands for his principal is entitled to his commission.

S. T. Srinivasagopala Chari for Petitioner.

A. V. Visvanatha Sastri for *G. S. Ramachandra Iyer* for Respondent.

Coutts Trotter and Seshagiri Iyer, JJ. 1916 February, 1. — S. A. No. 2386 of 1913.

Hindu Law—Inheritance—Gotrajas beyond the 14th degree —No right to inherit in Southern India—Jus Tertii, onus *of proof.*

The Hindu Law as prevalent in Southern India does not recognise the right of Gotrajas beyond the fourteenth degree to inherit. In a suit by a Bandhu to recover the inheritance, the *onus* of proving the existence of nearer heirs is on those who set it up.

C. V. Ananthakrishna Iyer and *K. R. Rangaswami Iyengar* for Appellants.

T. R. Ramachandra Iyer and *N. Rajagopalachariar* for Respondents.

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NOTES OF RECENT CASES.

Sadasiva Aiyar and Moore, JJ. 1916 February, 1. — C. M. A. No. 19 of 1915.

Civil Procedure Code Sch. ii para. 21—Private reference—Award—Application to file in Court—Satisfaction of the award, if a ground for refusal to file, the award and pass a decree.

Where an application is made to the Court to file an award made by the arbitrators on a reference out of Court, the mere fact that the terms of the award have been satisfied prior to the application is no ground for refusing to file the award and pass a decree thereon as required by Sch. ii para. 21 of the Civil Procedure Code.

C. S. Venkatachariar for Appellant.

C. V. Ananthakrishna Aiyar for Respondent.

Ayling and Napier, JJ. 1916 February, 2. — Crl. Revn. Case. No. 653 of 1915.

Criminal Procedure Code S. 145—Preliminary order—Statements filed—Magistrate if bound to continue inquiry, if no likelihood of breach of the peace, thereafter.

Where after the passing of a preliminary order under S. 145 (1) of the Criminal Procedure Code in pursuance of which written statements were filed by the parties, the Magistrate is satisfied that there is no apprehension of a breach of the peace, it is open to him to drop the proceedings at that stage.

T. Rangachariar and *K. V. Krishnaswami Aiyar* for Appellants.

E. R. Osborne for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 February, 2.

C. M. A. No. 86 of 1915.

Impartible Estate—Liability of holder for debts of predecessor—Mortgage—Acquisition of equity of redemption by mortgagee—Merger—Income of the estate—Extent of liability for debts.

The Mohunt of Tirupathi obtained a decree under O. 34 R. 6 of the Civil Procedure Code, against the late Rajah of Kalahasti, the holder of an impartible estate. The present Rajah had, before his accession, taken a mortgage of the estate from the late Rajah, who however did not discharge the mortgage. The present Rajah after his accession, had received the income of the estate for a number of years. The Mohunt of Tirupathi in execution of his decree, sought to attach a portion of the estate in the hands of the present Rajah, free of the mortgage in his favour. *Held,* that the mortgage in favour of the present Rajah created by the late Rajah, had been extinguished on the former's accession to the estate.

40 C. 89 (P. C.) and 29 M. L. J. 583, referred to.

Held further, that the income of the estate was assets in the hands of the present Rajah and in the absence of evidence that he had applied the income for purposes binding on the estate, he was liable to the creditors to the extent of the income received by him after his accession.

L. A. Govindaraghava Aiyar and *A. Ramachandra Aiyar* for Appellants.

The Hon'ble The Advocate General and *K. Rajah Aiyar* for Respondent.

Coutts-Trotter and Seshagiri Iyer, JJ.
1916 February, 3.

S. A. No. 37 of 1914.

Hindu Law—Widow—Alienation of portion of estate—Consent of reversioner, effect of.

Where a Hindu-widow alienates a portion of her estate with the consent of the then presumptive reversioner, the alienation is

not binding on the actual reversioner unless it was made for proper purposes, the consent of the presumptive reversioner being evidence of its propriety.

A Srirangachariar for *T. Rangachariar* for Appellants.

V. Ramesam for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 February, 8. — C. M. A. No. 107 of 1915.

Limitation Act Arts. 65 and 120—Minor—Receipt of money by next friend on behalf of minor—Surety for next friend—Failure of next friend to account to minor—Suit by minor on attaining majority against next friend and his surety—Limitation.

The next friend of a minor plaintiff received certain moneys on behalf of the minor and a surety for the next friend undertook to be liable in case the next friend did not account to the minor on his attaining majority. A breach of the obligation having occurred, the minor on attaining majority sued both the surety and the next friend for an account of the sums due to him. *Held,* that the suit as against the surety, being governed by Art. 65 of the Limitation Act, was barred having been instituted more than 3 years after majority; but, that the suit as against the guardian, being governed by Art. 120, was in time.

A. Krishnaswami Iyer for Appellant.

N. S. Rangaswami Iyengar for *T. Narasimha Iyengar* for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 February, 8. — C. M. A. No. 385 of 1914.

Civil Procedure Code S. 47 and O. 21, R. 90—Execution sale in contravention of provisions of decree—Sale in wrong order—Application to set aside.

Where an application is made by the judgment-debtor to set aside an execution sale on the ground that the properties were

not sold in the order directed by the decree, *held* that the application was one under S. 47 and not under O. 21 R. 90 of the C. P. Code.

T. Rangachariar for Appelllant.

C. V. Ananthakrisna Iyer for Respondent.

Sadasiva Aiyar and Moore, JJ. 1916 February, 9. — C. M. S. A. No. 90 of 1914.

Civil Procedure Code S. 60 (n) Right to future maintenance—Attachment in execution of decree—Appointment of receiver.

A right to future maintenance is not liable to attachment in execution of a decree against the maintenance-holder and the appointment of a receiver for realising such maintenance and applying it in satisfaction of the decree, is bad.

K. R. Subramania Sastri for Appellant.

T. S. Narayana Iyer for Respondent.

Chief Justice and Srinivasa Aiyangar, J. 1916 February, 9. — A. S. No. 376 of 1914.

Lunacy—Adjudication not superseded—Adoption by lunatic at sane intervals—Validity—Hindu Law—Adoption—Nature of —Act of.

An adjudication of lunacy not superseded does not prevent the lunatic from making a valid adoption if at the time of his making the adoption he is sane and is in a position to understand the nature of the act he is doing.

(1905) 1 Ch. 160 Distinguished.

An adoption is a religious act and not an alienation of property.

T. V. Venkataramier and *A. Venkatarayaliah* for Appellants.

B. Somayya for Respondent.

Coutts-Trotter, J.
1916 February, 10.

C. R. P. 663 of 1915.

Court Fees Act, S, 7 Sub-S. V. Cls. (b) and (d)—Scope and applicability—Suit for specific plot covered by a survey No. comprising large area—Valuation for purposes of Court-Fee and jurisdiction—" Separately assessed"—" Definite Share"—Meaning.

A suit for a specific plot of land comprising 3 acres and odd and covered by a particular survey number comprising an area of 4 acres and odd falls under S. 7 V. (*d*) and not under S. 7 V. (*b*) of the Court-Fees Act. The valuation of such a suit for purposes of Court-fee and jurisdiction is the market value of the land sued for.

16 A. 493 Referred to.

A. Krishnaswami Aiyar for Petitioner.

P. Narayanamurti for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 February, 15.

C. M. S. A. Nos. 95 & 96 of 1914.

Decree—Execution—Reference to pleadings and judgment—Power of executing court.

Where a decree is ambiguous. it is open to the court executing the decree to look into the pleadings and the judgment to ascertain its precise meaning. But where the provisions of a decree are reasonably clear, the executing court is not competent to add to, or vary its terms.

T. Rangachariar for Appellant.

T. R. Ramachandra Iyer and *G. S. Ramachandra Iyer* for Respondents.

Coutts-Trotter and Seshagiri Iyer, JJ. 1916 February 17. — S. A. No. 852 of 1914.

Burden of proof—Discharge—Suit on mortgage—Original deed in the possession of mortgagee with indorsement of discharge —Mortgagee only a markswoman—Presumption.

The presumption of discharge arising from the production by the mortgagor, of the original mortgage deed with an indorsement of discharge signed by the mortgagee, does not arise in a case where the mortgagee is a marksman and the indorsement is impeached as a forgery.

A. V. Visvanatha Sastri for Appellant.

T. Rangaramanujachari for Respondent.

Coutts-Trotter J. 1916 February 18. — Crl. Revn. Case No. 693 of 1915.

Evidence Act S. 24—Confession—Invalidiaing circimstance —Onus of proof.

Under S. 24 of the Indian Evidence Act, a confession is admissible *prima-facie*, and the *onus* is on the person objecting to its admissibility to prove that it was obtained by threat or coercion etc.

Under the English law, the *onus* in such a case would seem to be on the prosecution.

T. Rangachariar for Petitioner.

The Public Prosecuter for Government.

Coutts-Trotter and Srinivasa Iyengar, JJ. 1916 February, 18, — A. S. No. 90 of 1912.

Lessor and Lessee—Covenant for quite enjoyment—Breach—Cause of action when arises—Suit for declaration—Limitation.

The failure of the lessor to put the lessee into possession of the demised land goes to the root of the contract of lease and is

a complete and final breach which gives rise to a cause of action to the lessee at the inception of the term. The period of limitation commences from the date of the breach and there is no continuing cause of action throughout the period of the lease, for a suit by the lessee in respect of the breach.

Per Srinivasa Aiyangar, J. Though a covenant for title is a covenant for the whole of the term and is in that sense a continuing covenant, yet a breach of it is not a continuing breach.

The Government Pleader for Appellants.

T. Prakasam for Respondents.

Coutts-Trotter and Seshagiri Iyer, JJ. 1916 February, 18. — S. A. Nos. 1509 to 1511 of 1914.

Compromise—Validity of—Consideration—Transfer of Property Act S. 6—Executory Contract for conveyance—Assignment, if bad—Specific Relief Act S. 23—Executory contract by a member of a Hindu family—Liability of others.

A compromise is valid, if at the time it was entered into, there was consideration to support it. An executory contract for the conveyance of land is not property within the Transfer of Property Act, nor is it an actionable claim. At the same time it is not a mere right to sue and its assignment is not forbidden by S. 6 of the Transfer of Property Act. It is not the law that assignments cannot be supported unless they come within the Transfer of Property Act. Under S. 23 of the Specific Relief Act an assignee of an executory contract for the conveyance of land, can enforce the same.

Per Seshagiri Iyer J. The liability of a Hindu co-parcener as regards executory contracts is not different from his liability under executed contracts. In either case, the same considerations as to benefit and necessity, apply. An executory contract by the deceased manager of a Hindu family, is binding on the survivors if necessity is shown for the contract.

K. R. Subramania Sastri for Appellant.

K. Govinda Marar for Respondent.

Sir John Wallis, C. J.
Abdur Rahim, J.
Srinivasa Aiyangar, J.
1916, February 22.

Full Bench.
S. A. No. 1376 of 1914.

Civil Procedure Code O. 23, R. 1 (3)—Suit against alienee from a Hindu widow for declaration that alienation is not binding on the reversioners—Withdrawal—Subsequent suit for possession—Whether barred—" Subject-matter," " Matter "—Meaning of.

Where a reversioner brings a suit against the widow and the alienee for declaration that an alienation by a Hindu widow is not binding on the reversion, and during the pendency of the suit the widow dies and the suit is consequently withdrawn without liberty to bring a fresh suit, and subsequently he sues to recover possession from the alienee on the ground that the alienation is not binding on him, the subsequent suit is not barred by reason of the provisions of O. 23, R. 1 (3) of the Civil Procedure Code.

The cause of action and the reliefs asked for in the subsequent suit are different from the cause of action and reliefs in the former suit.

The provision in O. 23, R. 1 (3) being a penal provision, the terms "subject-matter" and "matter" ought to be construed strictly.

4 C. W. N. p. 110 followed.

21 M. p. 35 ; 1910 M. W. N. p. 782 ; 2 L. W. p. 177 overruled.

T. V. Venkatarama Aiyar for the Appellant.

S. Varadachariar for the Respondent.

NOTES OF RECENT CASES.

Coutts Trotter and Srinivasa Aiyangar, JJ. 1916 February, 18. — S. A. Nos. 2037 and 2038 of 1914.

Madras Estates Land Act, S. 3 Cl. (2) (c) and (d)—Grant by Nawab for subsistence of a relation—Jaghir—Inam—Jurisdiction of Civil Court.

Where certain lands were granted to a lady of the family of the Nawab of the Carnatic as a provision for her maintenance, the grant though styled as a Jaghir, is really an Inam and not a Jaghir within S. 3 (2) (c) of the Estates Land Act. Where the grantee of such lands holds both the Melvaram and the Kudivaram, the lands do not form an estate within S. 3 (2) of the Act and the jurisdiction of the Civil Courts is not ousted.

S. Subramanya Iyer for Appellant.

T. R. Venkatarama Sastri for Respondent.

Sir John Wallis, C. J. Abdur Rahim and Srinivasa Aiyangar, JJ. 1916 February, 22. — L. P. A. No 185 of 1915.

Criminal Procedure Code S. 147—Jurisdiction of Magistrate, under—Order prohibiting the public from passing through a public street, if legal.

It is not open to a Magistrate acting under S. 147 of the Criminal Procedure Code, to pass orders prohibiting the public from passing through a public street.

S. Krishnamachariar for Appellant.

Marthandam Pillai for Respondent.

Sadasiva Aiyar and Moore, JJ. 1916 February, 22. — C. M. A. No. 280 of 1914.

Civil Procedure Code, O. 21 R. 16 proviso (2)—Decree against assets of deceased in the hands of a defendant—Assign-

ment of decree to that defendant—Decree, if executable against other defendants, judgment-debtors.

Where a decree is passed against the assets of a deceased person in the hands of A, one of the defendants in a suit and against the rest of the defendants unconditionally, and A takes an assignment of the decree on payment of the decree amount from his private funds, *held* that O. 21, R. 16, proviso (2), applied and that the decree was not executable against the other judgment-debtors (defendants).

T. Rangachariar and *C. S. Venkatachariar* for Appellants.

T. R. Ramachandra Iyer and *K. S. Jayarama Iyer* for Respondents.

Sadasiva Aiyar and Moore, JJ. 1916 February, 25. — L. P. A. No. 318 of 1914.

Civil Procedure Code Ss. 2 (2) and 115—Abatement of suit—Dismissal—Order, if a decree—Appeal— Revision.

Where a suit is dismissed as having abated in consequence of the failure of the plaintiff to bring on record the legal representatives of the deceased defendant, the order amounts to a decree within S. 2 (2) of the Civil Procedure Code and is appealable. Where a remedy by way of appeal is open to a party, the High Court will not interfere in revision.

K. S. Jayarama Iyer for Appellants.

T. V. Muthukrishna Iyer for Respondents.

Abdur Rahim and Phillips, JJ. 1916 February, 29. — S. A. No. 221 of 1919.

Religious Endowment—Mutt—Succession—Dwandwa rule—Usage—Proof—Evidence Act S. 32 (4)—Fact in issue, proof of—Public right, what is.

Succession to the headship of a mutt is governed by the usage of the institution. *Dwandwa* mutts are interdependent mutts in this sense, that when there is a vacancy in the office of matadhipathi owing to the failure of the last occupant to nomi-

nate his successor in one mutt, the head of the other mutt can fill up the vacancy by ordaining a proper person and appointing him to the office. In other respects, the mutts are independent of each other. The *Dwandwa* rule is not a general law governing religious institutions but requires proof in each case before it can be held to apply to particular institutions. At the same time, the usage is not antagonistic to, or at variance with Hindu Law and courts will not require such strict proof of the usage, as in the case of a custom in derogation of the Hindu Law. Though there was only one instance of a head of the mutt having been appointed under the *Dwandwa* rule, yet having regard to the fact that the occasions for the application of the rule were rare and that there was no evidence of any other usage and the tradition the court upheld the custom. It is impossible to lay down as a general rule what amount of evidence is necessary to prove a custom in every case.

Where the usage of the mutt was to appoint a Balabrahmachari and ordain him a Sanyasi *Held*, that a Balabrahmachary who had already been ordained a Sanyasi could not be validly appointed to the mutt.

S. 32 Cl. (4) of the Evidence Act applies not only to a case where the public at large claim the disputed right but also where a section of the public *viz.*, the Madhwas are interested in a particular right. A statement falling within S. 32 of the Evidence Act can be admitted in evidence not only to prove a relevant fact but also a fact in issue.

T. Rangachariar and *K. Y. Adiga* for Appellants.

The Hon'ble the Advocate-General and *B. Sitarama Row* for Respondents.

Sadasiva Aiyar and Moore, JJ. 1916 February, 29. — C. M. A. No. 363 of 1914.

Hindu Law—Guardianship—Power of father to appoint testamentary guardian for the person and property of minor son.

A Hindu father is entitled to appoint a guardian for the person of his minor son, by will. But he has no right to appoint a testamentary guardian for his minor son in respect of joint

family property in which his son takes an interest by birth. 22 M. L. J. 247 ; 21 I. C. 848 ; 29 I. C. 475 referred to.

T. Rangachariar for Appellant.

The Hon'ble the Advocate General and *N. S. Rangaswami Iyengar* for Respondent.

Abdur Rahim and Phillips, JJ.
1916 February, 29.

A. S. No. 362 of 1914.

*Hindu Law — Widow—Alienation— Necessity—Proof—Old alienation—*Quantum *of proof—Barred debt.*

In order to justify an alienation by a widow, actual pressure in the shape of institution of suits by creditors, need not be proved. The widow is in possession of the estate in her own right and not as a trustee for the reversioners. In the case of alienations which are very old, courts would not require such strict proof of necessity as in the case of a recent alienation. A *bona fide* sale by a Hindu widow, of her husband's property in order to pay off a barred debt of her husband is binding on the reversioner.

9 M. L. J. 363 referred to.

T. Rangachariar for Appellant.

The Hon'ble the Advocate General for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 February, 29.

L. P. A. No. 217 of 1914.

Contract Act S. 178—Goods entrusted to commission agent for sale—Pledge by Agent—Rights of owner.

Whether the plaintiff handed over a jewel to a commission agent for sale on condition that he should pay over the proceeds to him after deducting his commission and the agent pledged the jewel to the defendant who acted in good faith, *held* that the plaintiff had transferred possession of the jewel to the pledgor and that he could redeem the jewel only on payment of the principal and interest of the pledge money.

K. S. Jayaram Iyer for Appellant.

T. V. Gopalaswamy Mudaliar for Respondent.

NOTES OF RECENT CASES.

Abdur Rahim, J.
Srinivasa Aiyangar, J.
1916 March, 7.

A. S. No. 324 of 1914.

Hindu Law—Will—Construction—Bequest to widow for life and to B, daughter's son then alive and other sons subsequently to be born—Death of B after testator but during lifetime of his widow—Effect—Right of B's widow—Rights of daughters' son subsequently born—Madras Act I of 1914—Scope and applicability.

A, a Hindu, executed a will in 1905 and died in 1906. By his will, he bequeathed all his properties to his wife for her life and after her death to B, his daughter's son who was then alive, and to the other sons that might be born to his daughter thereafter. B survived the testator but died in 1908 leaving a widow. In 1914 a son was born to the daughter of the testator. The testator's widow was alive at the date of suit and even subsequently. In a suit brought by B's widow, *held*

(1) The bequest to B and to the other daughter's sons was a gift to a class;

(2) The daughter's sons born during the lifetime of the widow of the testator, though subsequent to his death, were intended to take along with B;

(3) Madras Act I of 1914 applied to the case as the disposition in favour of the daughter's sons had not come into operation before the date of the Act.

(4) Each daughter's son as soon as he was born took a vested and transmissible interest.

(5) Though B died, his widow and the other daughter's sons of A born before the death of his widow took vested interests.

V. Ramesam and *P. Narayanamurti* for Appellant.

The Ag. Advocate-General and *B. Somayya* for Respondent.

Ayling, J.
Napier, J.
1916 March, 9.

S. A. No. 1460 of 1914.

Civil Procedure Code, O. 8, R. 6—Scope of—Transfer of Property Act, S. 132—Applicability—Mortgage—Assignment—Suit for sale by assignee—Mortgagor's plea of set-off in respect of decree obtained after assignment against original mortgagee for debt due prior thereto—Maintainability.

The claim to set-off allowed by O. 8, R. 6 of the Code is not available as against an assignee.

In a suit for sale upon a mortgage instituted by an assignee of the mortgage, *held* the defendant (mortgagor) cannot plead a set-off in respect of a decree obtained by him against the original mortgagee subsequent to the assignment, though the debt for which the decree was obtained was due to him before the assignment. *Held* further that neither S. 132 of the Transfer of Property Act nor any analogous principle of law could be invoked as against assignees of mortgage securities. (1901) 1 Ch. 213 explained; 17 M. L. J. 485 distinguished; 15 M. L. T. 293 Referred to.

C. V. Ananthakrishna Aiyar for Appellant.

A. S. Venku Aiyar for Respondent.

Abdur Rahim, J.
Srinivasa Aiyangar, J.
1916 March, 10.

A. S. No. 416 of 1914.

Contract Act S. 74—Penalty—Stipulation by way of—What is—Amendment of section—Effect—Loan with undertaking by borrower to sell certain property to lender in event of failure to repay on specified date—Provision for sale if can be held to be "penalty" within meaning of section.

Under S. 74 of the Contract Act of 1872 as amended by the Act of 1899 the penalty may be either a specified sum of money or any other stipulation intended by the parties to be a penalty for breach of a contract The penalty contemplated by the section is not limited to money.

Where A borrowed a sum of money from B, executed a promissory note therefor and undertook, by a Varthamanam executed in favour of B as part of the transaction of loan, to convey certain property to B in the event of his failure to pay the amount of the promissory note on a specified date, *held*, in a suit by B for specific performance of the contract to sell on the ground of A's default to pay on the specified date, or, in the alternative, for the amount due under the promissory note that S. 74 of the Contract Act could be applied to the case if the Court found that the stipulation for sale of the property in the event of

default to pay on the specified date was in the nature of a penalty within the meaning of that section.

The Advocate-General and *R. Krishnan-achariar* for Appellants.

A. Krishnaswami Aiyar and *C. Rajagopala Aiyangar* for Respondents.

Sadasiva Aiyar, J.
Moore, J.
1916, March 11. — C. M. A. No. 296 of 1914.

Guardians and Wards Act—Guardian—Order confirming appointment after acceptance of security—Appeal—S. 47 (1)—Effect—Civil Rules of Practice Rules 240, 241—Validity.

The final order confirming the appointment of a guardian of the properties of a minor after the acceptance of the security tendered by such guardian is not open to appeal under S. 47 cl. (1) of the Guardians and Wards Act.

Per Sadasivaiyar, J. (*Moore, J.* dissenting)—Rules 240, 241 of the Civil Rules of Practice, which indicate that the appointment of a guardian is made after the acceptance of the security, are *ultra vires.*

J. L. Rosario and *A. Swaminatha Aiyar* for Appellants.

C. S. Venkatachariar and *P. S. Vaidyanadha Aiyar* for Respondents.

Sadasiva Aiyar, J.
Moore, J.
1916, March 13. — C. M. S. A. No. 85 of 1915.

Foreign Court—Jurisdiction—Submission—What amounts to—Pudukota Court—Ex parte decree against non-resident foreigner—Application by defendant to set aside ex parte decree—Effect.

The filing of an application to set aside a decree passed exparte by a foreign Court (Pudukota Court) against a non-resident foreigner amounts to a submission to the jurisdiction of that Court and the defendant in such a case cannot resist the enforcement of the decree in a British Indian Court on the ground that the foreign Court had no jurisdiction to pass such a decree against him.

S. T. Srinivasagopalachariar for Appellant.

T. V. Muthukrishna Aiyar for Respondent.

Chief Justice and Phillips, J. 1916, March 14. } O. S. A. No. 19 of 1914.

Power of Attorney—Transaction—Authority to institute suit on behalf of firm—What constitutes—Plaint filed by agent alleged to be authorised by Power of Attorney—Power not containing authority—Agent in fact authorised to institute suit in question—Irregularity—Reversal of decree on ground of—C. P. C. of 1908 S. 99—Limitation Act, S. 19—Agent—Authority to acknowledge—Express authority not necessary.

Where objection was taken to the decree of the Court below on the ground that the plaint, which was presented by an agent purporting to act under a power of attorney executed by the plaintiffs in his favour, was not validly presented as the power did not authorise the agent to institute the suit, but there was uncontradicted evidence that the agent was authorised and directed to file the suit in question, *held*, that even if the power of attorney did not cover the case, there was merely an irregularity of procedure in respect of which the decree appealed against could not be altered or reversed under S. 99 of the Code.

It is not necessary to satisfy S. 19 of the Limitation Act that there should be an express authority in favour of the agent. The authority may be gathered from the circumstances of the case.

J. L. Rosario and *H. Balakrishna Rao* for Appellants.

T. R. Venkatarama Sastri and *L. S. Veeraraghava Aiyar* for Respondents.

Sadasiva Aiyar, J. and Moore, J. 1916, March 14. } C. M. A. Nos. 11, 12 to 14 of 1915.

Executing Court—Jurisdiction—Costs—Provision as to—Decree in accordance with judgment—Amendment of decree in execution—Legality—Remedy of aggrieved party—Amendment—Petition for—Conversion of, into one for review—Practice—Arbitration—Reference—Provision for costs of parties—Court if can pass inconsistent order.

When the decree is in accordance with the judgment with regard to the provision about costs, the executing court has no jurisdiction to amend the decree on the ground that the provision as to costs in the judgment was due to a mistake. Neither S. 151

nor S. 153 of the Code confers any such jurisdiction. The proper remedy in such a case is to apply for review.

When both parties provided by the agreement to refer to arbitration that costs of both sides should come out of their joint family funds, the court has no jurisdiction to direct costs to be paid by one party to the other. A petition for amendment of a decree may be converted into one for review of the judgment in the case.

V. Ramdoss for Appellant.

V. Ramesam and *T. Ramachandra Rao* for Respondents.

Chief Justice, Abdur Rahim and Srinivasa Aiyangar, JJ. 1916, March 15. — L. P. A. No. 20 of 1915.

Madras Estates Land Act, S. 3 Sub-S. 7 cl. (1)—"Old waste"—What is—Waste land let to one person for 5 years in 1901 and re-let to another in 1905, "at time of letting"—Meaning.

Waste land, which is let for the first time in 1901 for 5 years to one person and re-let to another in 1906 is not "old waste" within the meaning of S. 3 Sub-S. 7 cl. (1) of the Estates Land Act. The character of the land is to be determined with reference to the letting in question. The words "at the time of letting" in S. 3 Sub-S. 7 cl. (1) mean immediately prior to the letting in question.

V. Ramdoss for Appellant.

P. Nagabhushanam for Respondent.

Sadasiva Aiyar and Moore, JJ. 1916, March 16. — C. M. S. A. No. 69 of 1915.

Limitation Act of 1908, Art. 182 cl. (2)—Execution of decree—Limitation—Appeal against one defendant only—Limitation if saved as against other defendant, not even made party to appeal—Civil Procedure Code of 1908, O. 21, R. 16—Execution of decree—Right of decree-holder on record—Third parties becoming entitled to decree along with him subsequent to decree—Application by recorded decree-holder only—Maintainability.

Under Art. 182 cl. (2) of the Limitation Act of 1908, the time allowed for execution of a decree runs, in a cases in which there

has been an appeal from it, only from the date of the appellate decree, even as against a defendant who was not made a party to the appeal and against whom the decree appealed against was allowed to become final. 26 M. 91 F. B. foll. 20 C. W. N. 178 rel. 22 I. C. 685 cons.

The executing court is bound to allow execution at the instance of the person whose name appears on the record as decree-holder, notwithstanding that other persons may, subsequent to, the decree, have become jointly interested in the decree with him. 29 M. L. J. 693 foll.

A. Krishnaswami Aiyar for Appellant.

A. S. Visvanatha Aiyar for Respondent.

Abdur Rahim and
Srinivasa Aiyangar, JJ.
1916, March 22.

A. S. No. 118 of 1915.

Partnership—Partner authorised to borrow on behalf of firm—Loan contracted by partner and execution of pro-note for it—Execution not as partner—Liability of other partners for debt covered by note—Negotiable Instrument—Suit on original cause of action—Maintainability—Loan and execution of note simultaneous—Effect.

If a member of a firm, who is authorised to borrow money on its behalf borrows it and executes a pro-note for it, the firm is liable for the debt covered by the note, even though the member does not execute the note as partner. 39 B. 261 P. C. foll. 17 M. L. J. 126 cons. 26 M. L. J. 19 dist.

Except in cases in which a debt becomes merged in a negotiable instrument, a suit for the recovery of a debt for which a pro-note has been executed is maintainable as well in cases in which the note and the advance were simultaneous as in cases in which the note was executed for securing an antecedent debt.

A. Krishnaswami Aiyar and *M. Subbaraya Aiyar* for Appellants.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for Respondents.

NOTES OF RECENT CASES.

The Chief Justice
Phillips, J.
1916 March, 9.

O. S. A. No. 59 of 1915.

Trusts Act—S. 23 (f)—Trustee—Breach of Trust—Employment of trust property in trade or business—Interest—Liability for—Rate allowable.

A trustee who has committed a breach of trust by employing trust property in trade or business is liable, under S. 23 cl (f) of the Trusts Act, to pay interest only at 6 % compound interest with half-yearly rests. An order directing him to pay interest at 12 % compound interest is wrong.

The Advocate-General, V. V. Srinivasaiyangar and *T. G. Raghavachariar* for Appellant.

R. Subramania Aiyar for Respondent.

Abdur Rahim J.
Srinivasa Aiyangar, J.

A. S. No. 320 of 1914.

Practice—Events subsequent to suit—Court if and when will take note of—Mortgage—Properties situated in Agency and in plain tracts—Suit in civil courts—No objection raised—Objection in appeal for first time—Maintainability—Decree if will be reversed on ground of objection—C. P. C. of 1908, S. 21—Effect.

In a suit for the recovery of the principal amount and interest due under a mortgage bond by sale of the mortgaged properties, their Lordships passed a decree as prayed for, although the principal amount had not, by reason of the stipulations in the bond, become payable at the date of suit and became payable only during the pendency of the appeal in the High Court.

Where a suit for sale on a mortgage was instituted in the civil courts although part of the properties comprised in the mortgage and forming the subject-matter of the suit lay in the Agency tracts and a decree was allowed to be passed by the first court without objection, *held* that the objection could not be taken in appeal under S. 21, C. P. C.

V. Ramesam for Appellant.

Hon. B. N. Sarma and *K. S. Aravamudu Aiyangar* for Respondents.

Sadasiva Aiyar and
Moore, JJ.
1916 March, 22.

S. A. Nos. 898, 900 of 1913.

Minor-Appellant—Representation—Death of guardian ad-litem *appointed by court below—Failure to appoint fresh guardian—Appeal heard and decided without guardian* ad litem.

Validity of decree—Execution Sale—Validity—Rights of bona fide *purchaser.*

Where the guardian *ad litem* of a minor defendant—appellant died pending the appeal and the appeal was heard and decided against him without a fresh guardian being appointed, *held* that the decree in the appeal was void as the minor was not properly represented and that a sale of the property of the minor in execution of such decree was also void and conveyed no title even to a *bona fide* purchaser.

G. Venkataramiah (*B. Narasimha Rao* and *N. Rama Rao* with him) for Appellants.

V. Ramesam, P. Narayanamurthi and *P. Somasundaram* for Respondents.

Wallis, C. J.
Phillips, J.
1916 April, 4.
C. M. P. Nos. 2697 to 2700 of 1915.

Companies Act S. 68—Mortgage—Advance of money by officer of a limited Company out of funds of a joint family of which he is manager.—Omission to register—Effect of.

Where the manager of a joint Hindu family who is an officer of a Limited Company advances in his individual capacity, money on a mortgage to the Limited Company, the mortgage is invalid for want of registration under S. 68 of the Companies Act, in spite of the fact that the consideration for the mortgage was paid out of the joint family funds.

T. Narasimha Iyengar and *C. Padmanabha Iyengar* for Petitioners.

A. Krishnaswami Iyer and *K. Balasubramania Iyer* for Respondents.

Sir John Wallis, C. J.
Abdur Rahim J.
Srinivasa Aiyangar, J.
1916 April, 5.
S. A. 1366 of 1914.

Minor—Mortgage or sale in favour of—Validity—Indian Contract Act Ss. 2, 10—Transfer of Property Act S. 7.

A mortgage or sale in favour of a minor for executed consideration is valid; and there is nothing in the Contract Act or Transfer of Property Act against its validity.

33 Mad. 312 overruled.

P. R. Ganapati Aiyar for the appellant.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for the respondent.

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